Nos. 79-1433 and 79-153

Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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DONALD GEORGE MASKENY, *et al.*,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA,

---

TONY DARWIN,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## PETITIONERS' REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

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### ARGUMENT I

Although the court of appeals quite clearly based its ruling on the absolute disparity and substantial impact standards of representativeness, Pet. App. 13a-15a, 17a-19a, the government argues in its Brief in Opposition that this is not an appropriate case for review of those standards.

The government's position is, basically, that an underrepresentation of blacks, no matter how large and regardless of the appropriate standard of representativeness, is not challengeable if it is the result of use of an unrepresentative voter list. This was not decided or discussed by the court of appeals, and it addresses only part of Petitioners' challenge and the court's decision, both of which go beyond the source list issue. Moreover, although this argument does have some support in other decisions, such as the Tenth Circuit's *Evans* decision cited by the government, it is based on tautological reasoning and is inconsistent with this Court's constitutional decisions and the Jury Selection and Service Act of 1968, 28 U.S.C. § 1863(b)(2).

Putting aside the question of whether nonvoters constitute a cognizable group and the situation where there has been involuntary exclusion from voting, neither of which are involved here, every underrepresentation of a cognizable group on a voter list results from "an identifiable group vot[ing] in a proportion lower than the rest of the population," Brief in Opposition, at 9 (quoting *Evans*). To validate the use of voter lists on this basis is to validate *all* voter lists, no matter how unrepresentative.

Registration to vote is not a qualification for jury service; in this context, voter lists are simply lists of names used as a means to an end—representativeness—not an end in themselves. Voter lists generally provide a far more representative list than the key man procedures they have replaced in the federal and most state jury systems. However, as an increasingly lower proportion of the population has been participating in the electoral process, some voter lists have become increasingly unrepresentative of racial minorities and



other cognizable groups. *See Jury Representativeness,* at 805–809. Whether or not such minorities vote in the same proportion as the overall population, their serious underrepresentation in the jury system undermines the rights of criminal defendants to fair trials and the legitimacy, impartiality and integrity of the judicial process. *See Duren v. Missouri,* 439 U.S. 357 (1979); *Castaneda v. Partida,* 430 U.S. 482 (1977); *Taylor v. Louisiana,* 419 U.S. 522 (1975).

Moreover, § 1863(b)(2) specifically requires supplementation where voter lists are not sufficiently representative, and Congress, at the urging of the Justice Department, has rejected an amendment that embodies the government's position in this case. *See* Petition, at 18 n.13. *See generally Jury Representativeness,* at 809–14.

The court of appeals explicitly based its ruling on the standards of representativeness issues, and this case is a particularly appropriate one for review of those issues. The voter list issue is of major importance and could be reviewed in this case, but it does not resolve the standards of representativeness issues and is not necessarily involved.*

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*It should be noted that the government's discussion of the population that is black, Brief in Opposition at 6–7, 7 n.6, misrepresents the record. Petitioners' unrebutted proof, based on the 1970 Census, established that 29% of the jury-age population in the area comprising the Southern District of Georgia was black. Petitioners did not use "total population" figures, as the government claims. Also, the government's figures, used in its Brief in Opposition but nowhere in the record, are for the whole state of Georgia, *id.* at 7 n.6, not the Southern District. The 29% figure from the Census is actually a minimum figure, since the Census Bureau has itself recognized that its procedures tended to significantly undercount blacks. *See* Shryock and Siegel, *The Methods Demography* (U.S. Government Printing Office 1973); Siegel, *Estimates of Coverage of the Population by Sex, Race, and Age in the 1970 Census,* 11 Demography 1 (1974).

## ARGUMENT II

The trial record belies the government's assertion that Petitioners' counsel were unreasonable in their reliance on the trial court's assurances that the multi-species question was a matter for the jury (79-1433, 79-1532 Opp. 12). The government argues that because the trial court denied Petitioners' motion for judgment of acquittal, counsel could not have been misled concerning the instructions the court intended to give the jury. This contention is not supported by the record.[1]

Immediately following the denial of Petitioners' motion, counsel suggested that the court review a Wisconsin district court opinion and the Single Convention on Narcotics and Drugs (Tr. 686-687). Counsel pointed out that Congress, in fact, recognized the existence of more than one species of marijuana in 1970 when the drug control laws were rewritten. The trial judge agreed to review the materials[2] (Tr. 687).

As correctly represented by the government, Petitioners thereafter began the defense by presenting an expert on forensic chemistry who testified extensively,

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[1] In deciding a motion for judgment of acquittal, all inferences to be drawn from the underlying facts contained in the moving parties' motion must be viewed in the light most favorable to the government.

[2] The government's remarks in footnote of its Brief in Opposition are similarly unfounded in view of the responsibility of the fact-finding court to determine whether the facts upon which United States v. Gaines, 489 F.2d 690 (5th Cir. 1974), and similar decisions were founded are "now supported by modern authority. *See* Brown v. Board of Education of Topeka, 347 U.S. 483, 494 (1954). If the trial court were to have found, as Petitioners suggested, that the factual basis upon which *Gaines* was decided was significantly changed, it would have been incumbent upon that court to disregard the decision.



and without objection, that Cannabis is a genus of which there are two and possibly three species. Petitioners' expert further testified, again without objection, that the tests performed by the government's expert were insufficient to determine whether the marijuana involved was sativa L. or some other species (Tr. 739-745). A substantial part of Petitioners' argument to the jury was thus based upon Petitioners' consistent theory that the government had failed to prove that the substance involved was Cannabis sativa L.

Further, when the disputed instruction was given, the trial court had not "just finished ruling that the statutory definition included 'all types of Cannabis'," as the government attempts to represent in its Brief in Opposition (79-1433, 79-1532 Opp. 12). The court's denial of Petitioners' motion for judgment of acquittal at the close of the government's case was immediately followed by extensive expert testimony and a slide presentation during which slides of each of the different species were shown to the jury. The testimony and

presentation proceeded without objection by the government, or the court, and could only have been viewed by the court and counsel as relevant to the multi-species question.

Respectfully submitted,

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